PP

v.

ISMAIL ABD WAHAB

COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: J-09-167-05-2012]
26 APRIL 2013

CIVIL PROCEDURE: *Appeal - Notice of appeal - Whether filed within time - Whether there was application to condone delay - Whether the Rules of the Court of Appeal 1994 must be complied with - Discretion of court to extend time to file notice of appeal - Whether could not be sustained in light of art. 5(1) Federal Constitution - Criminal Procedure Code, s. 307 - Courts of Judicature Act 1964, s. 51*

The Public Prosecutor in this case appealed against the decision of the High Court delivered on 20 April 2012. It was not in dispute that the notice of appeal was only filed on 9 May 2012, when it ought to have been filed on or before 3 May 2012. Thus, the respondent raised a preliminary objection that (i) the notice of appeal was not filed within time; (ii) there was no application to condone delay; and (iii) the delay could not be condoned on the day of hearing. The appellant, however, submitted that it was not late in filing the notice of appeal because the court had received the fax copy on 2 May 2012.

Held (dismissing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) Section 307 of the Criminal Procedure Code, which states that the notice of appeal must be filed within 14 days from the date of decision, must be read with s. 51 of the Courts of Judicature Act 1964 ('CJA'). The strict requirements of s. 51 of the CJA must be complied with to sustain the appeal. There was no room to say that a fax copy of the notice of appeal would suffice to satisfy the requirement of s. 51. (paras 5 & 7)

(2) The appellant must comply with the Rules of the Court of Appeal 1994, and if it is an appeal by the Prosecutor, it also permits the Prosecutor to make an application immediately to seek a warrant of arrest and/or seek bail. Such steps must be taken immediately to preserve the integrity of the appeal process and to make sure the accused, after having been acquitted by the trial court, is made subject to the control of the appellate court until the appeal procedure is exhausted. (para 8)

(3) The procedure by way of discretion of court to extend time to file notice of appeal against the accused could not be sustained in light of art. 5(1) of the Federal Constitution. That discretion should not be exercised against the accused when the law is that the prosecution must file the notice of appeal within 14 days. In the instant case, notice of appeal was not filed according to the law and no application was filed to condone delay. (para 14)

Bahasa Malaysia *Translation Of Headnotes*

Pendakwa Raya dalam kes ini merayu terhadap keputusan Mahkamah Tinggi yang telah disampaikan pada 20 April 2012. Ia tidak dipertikaikan bahawa notis rayuan hanya difailkan pada 9 Mei 2012, sedangkan ia sepatutnya difailkan pada atau sebelum 3 Mei 2012. Oleh itu, responden telah membangkitkan bantahan awal iaitu (i) notis rayuan gagal difailkan dalam tempoh yang ditetapkan; (ii) tiada permohonan untuk membenarkan kelewatan; dan (iii) kelewatan tidak boleh dimaafkan pada tarikh perbicaraan. Perayu, walau bagaimanapun, menghujahkan bahawa tiada kelewatan dalam pemfailan notis rayuan tersebut kerana mahkamah telah menerima salinan faks pada 2 Mei 2012.

Diputuskan (menolak rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 307 Kanun Tatacara Jenayah, yang menyatakan bahawa notis rayuan harus difailkan dalam tempoh 14 hari dari tarikh keputusan, perlu dibaca dengan s. 51 Akta Mahkamah Kehakiman 1964 ('AMK'). Syarat-syarat ketat s. 51 AMK harus dipatuhi untuk mengekalkan rayuan. Tiada ruang untuk mengatakan bahawa salinan faks adalah memadai untuk memenuhi keperluan s. 51.

(2) Perayu harus mematuhi Kaedah-Kaedah Mahkamah Rayuan 1994, dan jika ia adalah rayuan oleh pihak pendakwaan, ia juga membenarkan pihak pendakwaan membuat permohonan dengan serta merta untuk mendapatkan waran tangkap dan/ atau mendapatkan jaminan. Langkah-langkah sebegitu harus diambil serta merta bagi mengekalkan integriti proses rayuan dan bagi memastikan tertuduh, selepas dibebaskan oleh mahkamah perbicaraan, tertakluk kepada kawalan mahkamah rayuan sehingga semua saluran prosedur rayuan telah digunakan.

(3) Prosedur melalui budi bicara mahkamah untuk melanjutkan masa pemfailan notis rayuan terhadap tertuduh tidak dapat dikekalkan dengan per. 5(1) Perlembagaan Persekutuan. Budi bicara itu tidak boleh dilaksanakan terhadap tertuduh apabila undang-undang menyatakan bahawa pihak pendakwaan harus memfailkan notis rayuan dalam tempoh 14 hari. Dalam kes ini, notis rayuan tidak difailkan mengikut undang-undang dan tiada permohonan difailkan untuk membenarkan kelewatan.

Case(s) referred to:
Chin Kek Shen v. PP [2013] 1 LNS 299 CA ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Muhamad Asri Bakar v. PP [1996] 1 LNS 496 HC ***(refd)***
PP v. Jawan Empaling & Anor [1996] 2 CLJ 328 HC ***(refd)***
Veerasingam v. PP [1957] 1 LNS 93 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 51, 56A
Criminal Procedure Code, ss. 307(9), 310
Federal Constitution, art. 5(1)
Rules of the Court of Appeal 1994, rr. 58, 59, 60, 61, 62, 63, 64

Constitution of India [Ind], art. 21

For the appellant - Anselm Charles Fernandis; DPP
For the respondent - Noor Din Hussin; M/s Tia & Noordin

[Appeal from High Court, Johor Bahru; Suit No: MTJ (1) 42S-82-2011]

Reported by Suhainah Wahiduddin

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JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] This is our judgment in respect of the respondent's preliminary objection that (i) the notice of appeal was not filed within time; (ii) there was no application to condone delay; (iii) the delay could not be condoned on the day of hearing. My learned brothers, Mohamed Apandi Ali JCA and Linton Albert JCA have read the judgment and approved the same.

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Brief Facts

[2] In the instant case the PP is appealing against the decision of the High Court delivered on 20 April 2012. It is not in dispute that the notice of appeal was only filed on 9 May 2012, when it ought to have been filed on or before 3 May 2012. The appeal proper came up for hearing on 25 March 2013 and there was no application to condone delay. The learned Deputy Public Prosecutor on this issue submits as follows:

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(i) The appellant has faxed the notice of appeal on 2 May 2012 and the notice of appeal was received by the Registrar on 9 May 2012. And argues that the appellant was not late in filing the notice of appeal because the court had received the fax copy on 2 May 2012.

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(ii) The appellant relies on the case of *PP v. Jawan Empaling & Anor* [1996] 2 CLJ 328, where the High Court condoned the filing of a fax copy of a petition of appeal (not notice of appeal). The court *inter alia* held:

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> [3] Section 307 CPC does not provide specifically that only the original copy of the petition of appeal ought to be lodged. The section, being a procedural law, is open to a liberal construction and so, it may extend to include a copy other than the original copy.

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> [4] A copy of a document in whatever form in most cases has been accepted and widely used as documentary evidence in court in cases where the original is not readily available. An illustration to s. 3 Evidence Act 1950, in addition, states that a photographic or other visual recording including a recording of a photographic or other visual transmission over a distance, is a document. In the light of these, a fax copy of

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the petition of appeal here cannot be said to be an unlawful document. Clearly, such a document is a document within the meaning of s. 3 of the Evidence Act.

[5] It is untenable to contend that a fax copy is not an original or primary document within the meaning of s. 63 of the Evidence Act 1950. Section 63 of the Act mainly concerns with evidence, the proof of a fact by means of a documentary evidence, either primary or secondary. In the instant case, there was no dispute as to the content of the said documents. In any case, the appeal here, having been accepted by the Registrar, must be deemed to have been properly filed. On the facts, there is no reason for the court to intervene in the Registrar's exercise of his discretion in accepting the appeal in the form it was presented to the court.

[3] It must be noted that paras 4 and 5 of the decision above is an erroneous proposition of law which has no application to filing of petition of appeal as provided by s. 307(9) of the Criminal Procedure Code (CPC) which requires the petition of appeal to be lodged and not just faxed or emailed etc. The said section reads as follows:

(9) If a petition of appeal is not lodged within the time prescribed by this section the appeal shall be deemed to have been withdrawn and the trial court shall enforce its sentence or order if any stay of execution has been granted, but nothing herein contained shall be deemed to limit or restrict the powers conferred upon a judge by section 310.

[4] Basically it is a simple procedure and had been followed for decades and to say that petition of appeal can be filed by way of fax will have no jurisprudential justification save in cases where a fax copy is sent within time and having lodged the petition of appeal out of time the appellant files an application immediately to condone the delay in filing the petition of appeal, and provide reasons for the court to condone delay in lodging the appeal. In *Goi Ching Ang v. PP* [1999] 1 CLJ 829; [1999] 1 MLJ 507 the Federal Court stated that any departure from the entrenched judicial interpretation laid down in the long line of decisions should be left to the legislature. (See *Chin Kek Shen v. PP* [2013] 1 LNS 299 Cri. A No: B-05-83-03-2012 (05-04-2013)).

[5] The preliminary objection is related to delay in filing of notice of appeal and not petition of appeal and in consequence the above case is not relevant. When it relates to notice of appeal, s. 307 of the CPC states that the notice of appeal must be filed within 14 days from the date of decision. Section 56 of the Courts of Judicature Act 1964 (CJA 1964) and s. 310 of the CPC give some discretion to the court to condone delay, in order that substantial justice may be done in the matter. The said section reads as follows:

> S 56 CJA 1964 – The court of appeal may in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon such terms and with such directions as it may consider desirable in order that substantial justice may be done in the matter, and may, for the purpose, enlarge any period of time prescribed by s. 51 or 53.
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> S 310 CPC – A judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as the Judge shall consider desirable, in order that substantial justice may be done in the matter.

[6] The above two sections are applicable to notice of appeal as well as petition of appeal. From decided cases courts are liberal in condoning application to file out of time the petition of appeal and not notice of appeal. (see *Veerasingam v. PP* [1957] 1 LNS 93; [1958] MLJ 76; *Muhamad Asri Bakar v. PP* [1996] 1 LNS 496).

[7] Section 307 of the CPC relating to filing of notice of appeal must be read with s. 51 of the CJA 1964. And the strict requirements of s. 51 of the CJA 1964 must be complied with to sustain the appeal. There is no room to say a fax copy of notice of appeal will suffice to satisfy the requirement of s. 51. The said section reads as follows:

> (1) Every appeal shall be by notice in writing which shall be filed with the Registrar of the Court from which the appeal lies at the place where the decision appealed against was given within fourteen days after the date of the decision.

(2) Every notice of appeal shall state shortly the substance of the judgment appealed against, shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate, and, except where the notice of appeal is given orally under s. 54, shall be signed by the appellant or his advocate:

Provided that, in a case of an appeal under subsection 50(2), the computation of the aforesaid period of fourteen days shall commence from the date immediately after leave has been granted by the Court of Appeal.

[8] One must not assume that s. 307 of the CPC and/or s. 51 of the CJA only deals with notice of appeal. The appellant must also comply with the Rules of the Court of Appeal 1994 (RCA 1994), and if it is an appeal by the Prosecutor, it also permits the Prosecutor to make an application immediately to seek a warrant of arrest and/or seek bail. Such steps must be taken immediately to preserve the integrity of the appeal process and to make sure the accused after having been acquitted by the trial court is made subject to the control of the appellate court until the appeal procedure is exhausted. Section 56A of the CJA 1964 specifically says:

Where an appeal is presented against an acquittal, the Court of Appeal may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail.

[9] It is our general observation that the Attorney General Chambers does not promptly make the necessary application to seek warrant of arrest and/or bail and in consequence many of the appeals filed by the Public Prosecutor at the end of the day is struck out for the reason that the respondent/accused could not be located.

[10] Rule 58 to 64 of the RCA 1994 deals with notice of appeal. And r. 58 states:

(1) Within fourteen days of the decision of the High Court or within such extended time as the court may allow the appellant shall file in the Registry of the High Court at the place where the decision appealed against was given a notice of appeal and eight copies thereof. A copy of the notice of appeal shall be sent by the appellant to the Registrar of the Court of Appeal.

A (2) The notice of appeal shall be substantially in Form five in the First Schedule.

(3) As soon as notice of appeal is filed by the Public Prosecutor as in subrule (1), the Court of Appeal may on an application by the Public Prosecutor issue a warrant directing that the
B accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail in accordance with the provisions of s. 56A of the Courts of Judicature Act 1964 (Act 91).

C (4) The application under subrule (3) may be made by motion *ex parte* and for the purpose of this subrule, rules 71 and 72 shall apply.

[11] It must also be noted that rr. 58 to 64 do not make any provision for notice of appeal to be filed by fax.

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[12] We agree with the learned Deputy Public Prosecutor that the court has discretion to condone delay in filing of notice of appeal. However, in our view the discretion should not be exercised and/or sparingly exercised when it relates to notice of
E appeal by the Public Prosecutor **as opposed to the accused** and the discretion to condone delay in respect of petition of appeal must be readily given unless it will result in miscarriage of justice. (emphasis added). Our reasons *inter alia* are as follows:

F (a) At common law the prosecution could not easily maintain a criminal appeal against the decision of the jury on all issues, more so on finding of facts.

(b) Article 5(1) of the Federal Constitution gives special protection to the accused. The article reads as follows:

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> No person shall be deprived of his life or personal liberty save in accordance with law.

(c) Section 307 of the CPC as well as s. 51 of the CJA 1964 requires the notice to be filed within 14 days. That is the law
H and s. 56 only relates to discretion and in the light of art. 5(1) it is doubtful whether discretion can be exercised to defeat the constitutional provision. We are of the view that such discretion should not be exercised to the detriment of the accused/respondent.

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[13] The Indian equivalent of art. 5(1) is art. 21 of the Indian Constitution. In India the fundamental guarantee provision for protection of life and personal liberty has a rider, that is to say 'except according to procedure established by law'. The said Indian article reads as follows:

> No person shall be deprived of his life or personal property except according to procedure established by law.

[14] Article 5(1) has no such rider and in our considered view the procedure by way of discretion of the court to extend time to file notice of appeal against the accused cannot be sustained in light of art. 5(1) of the Federal Constitution. Law in our constitution and procedure in the Indian Constitution cannot be treated as synonymous, when exercising discretion. Law reflects element of certainty and procedure paves way for flexibility, discretion and judicial arbitrariness. In consequence it is our considered view that discretion should not be exercised against the accused when the law is that the prosecution must file the notice appeal within 14 days.

[15] In the instant case notice of appeal was not filed according to the law and no application was filed to condone delay. On such facts we have no hesitation in dismissing the appeal *in limine*. In consequence the appeal is dismissed.